Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

YANKEE ENTERPRISES, INC.,

Petitioner,

vs.

DUNKIN' DONUTS INCORPORATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a franchisor owes a duty to franchisees to safeguard and protect the reputation and goodwill of the franchise and whether franchisee can recover damages for the franchisor's breach of the duty to maintain franchise standards?

2. Whether lost profits can properly be established by comparison of sales of franchisee damaged by franchisor's breach of contract to average sales of franchisees in region that has not been effected by franchisor's breach?

STATEMENT PURSUANT TO RULE 29.6

Petitioner has no parent company and no nonwholly owned subsidiaries.

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Yankee Enterprises, Inc. (herein "Petitioner") respectfully prays that a Writ of Certiorari issue to review the decision of the United State Court of Appeals for the Fifth Circuit entered in this case, affirming in part, and reversing and rendering in part, the judgment of the United State District Court for the Eastern District of Texas at Beaumont.

OPINIONS BELOW

The opinion of the court of appeals is attached as Appendix A (p. 1a) and its denial of the petition for rehearing is attached as Appendix C (p. 11a). The opinion of the district court in *Yankee Enterprises, Inc. v. Dunkin' Donuts, Inc.* is attached as Appendix B (p. 8a).

STATEMENT OF JURISDICTION

The court of appeals issued its opinion on July 8, 1997. (Appendix A, p. 1a). The court of appeals overruled Petitioner's petition for rehearing on August 11, 1997. (Appendix C, p. 11a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

This case presents the Court with an issue of wide reaching implication. The United States Court of Appeals for the Fifth Circuit reversed the trial court's finding in favor of Petitioner Yankee Enterprises, Inc. ("Yankee") on a breach of franchise agreement claim. Although Yankee had established by expert and fact witness testimony that its store was damaged by Respondent Dunkin' Donuts' ("Dunkin") breach of its franchise agreement with Yankee, the Fifth Circuit labeled Yankee's theory of damages "suspect", disregarding that essentially all documentary evidence at trial was self-authored by Dunkin', and went on to determine that a franchisee who has been

damaged by a franchisor's breach of a franchise agreement cannot establish lost profit damages by comparison of its store to other "undamaged" franchisee stores in another region of the country. The Fifth Circuit's opinion, in effect, makes it impossible for franchisees to establish damages when a franchisor, by its breach of a franchise agreement, has damaged an entire region. Thus, the Fifth Circuit's opinion gives free license to franchisors to disregard their franchise agreements, provided that the breach extends to an entire region of franchisees. The effect of this ruling is to leave franchisees without an effective remedy at law, and is clearly against public policy.

A. Factual Background and Proceedings in the District Court.

Petitioner Yankee Enterprises, Inc. is a small, family owned business operating as a franchisee of Dunkin'. Yankee operates a single Dunkin' store in Beaumont, Texas. Dunkin' is a large, multinational corporation that franchises donut stores across the United States and around the world. Yankee entered into a franchise agreement with Dunkin', which forms the basis of the underlying suit. In the franchise agreement, Dunkin' agreed:

> to maintain high and uniform standards of quality, cleanliness, appearance and service at all Dunkin' shops, thus protecting and enhancing the reputation of Dunkin' and demand for Dunkin's products.

The evidence introduced at trial established that Dunkin' had drastically cut the employees and services it provided to those franchisees, such as Yankee, situated in the West Zone ("WZ") of the United States. On Dunkin's self-administered tests of WZ stores, the WZ was shown for years to have barely passing scores in sanitation, quality control, appearance and service (*i.e.*,

"standards"). The evidence also established that Dunkin' had taken advertising funds belonging to WZ franchisees and diverted them to other areas of the country where Dunkin' was attempting to grow, thereby causing damage to the sales and profits of franchise owners in the WZ, and specifically, to Yankee. Fact witnesses and experts alike testified as to the serious detrimental effect these actions and store conditions had on Petitioner. The district court awarded damages to Petitioner based on the jury's findings that Respondent had breached its franchise agreement.

B. Factual Background and Proceedings in the Court of Appeal.

The Fifth Circuit erred in refusing to recognize a causal link between a franchisor's failure to maintain high and uniform standards throughout a franchise region, and damages incurred by a franchisee operating within that region in the form of lower sales and lost profits resulting therefrom. The Fifth Circuit's rejection of evidence comparing Petitioner's sales with the only uneffected region, the North East Zone ("NEZ") (with which Petitioner's sales had once been on par) left Petitioner without any means of establishing damages, and therefore, without a remedy for Respondent's wrongdoing.

In overruling the jury's verdict by finding "no evidence" to support Yankee's damages claims, the Fifth Circuit failed to consider the overwhelming evidence presented to the trial court evidencing both Dunkin's disregard of its obligations under the franchise agreement as well as the overwhelming evidence that Yankee has been damaged by Dunkin's actions. Voluminous evidence, including Dunkin's internal documents, its published documents, and testimony of Dunkin's executives, as well as witness testimonies, all established that, primarily because of shared advertising and goodwill, a decrease in standards within

a group of stores will have a direct negative effect on the gross sales of any single store in that group. In fact, Dunkin's own internal documents established that a decrease in standards will have a *direct negative effect* on the gross sales of all other stores. Moreover, in the franchise agreement, paragraph 3c, Dunkin' promises to maintain high and uniform standards *in order to protect the reputation of, and enhance the demand for Dunkin's products*. Thus, the contract in issue recognizes that a decrease in standards will lead to decreased sales. It is Dunkin's failure to honor its agreement and the Fifth Circuit's failure to recognize that damage to a franchise reputation causes damage to individual franchisees that forms the very basis of this Petition.

The record shows that Dunkin' has not fared well across the entire breadbasket and small-town areas of the USA ranging from the western Carolinas all the way west to the Pacific Ocean. Stores within this broad area (except for the metropolitan areas) have languored in sales growth, and many markets have declined, resulting in franchisee failures and permanent store closures — a mirror-image story to the sweet success and goodwill enjoyed by Dunkin' in the north and east regions of the United States. This case examined the reasons for the regional variations in profitability and success of Dunkin' stores and presented damaging evidence that Dunkin's own actions and decisions virtually forced franchise failures and store closures in large geographical areas. To facilitate regional comparisons, Petitioner used its own area of franchise operations called the "West Zone" (WZ) which is, by every measurement, the most dismal in sales, profits, quality of operations and reputation of all Dunkin' zones or operational areas. Just ten years previously, the WZ was nearly as vibrant in store sales and profits as was the richest area of Dunkin' called the "Northeast Zone" (NEZ) — only 13% apart. Today, the WZ average store sales is just 1/3 of the NEZ average same-store-sales. Dunkin's own records show that store sales, profits, operating standards (conditions), goodwill,

reputation, market share and store resale values were all lower in the WZ largely because of Dunkin's insouciance towards the problems of the WZ and also because Dunkin' was eager to vacate the WZ in favor of more lucrative Eastern and overseas markets.

Dunkin's records also show an unquestionable company conspiracy to sabotage WZ franchisee interests and assets, all designed to get out of, or "exit", the WZ. Franchisees were constantly assured that once completed, changes in organization and services would result in more services, better communications and greater efficiencies, but after years of promises and coincidental deterioration, franchisees (at least those who are still in business) are still waiting for the promised benefits.

The Fifth Circuit erred in overturning the District Court's judgment awarding Petitioner damages for breach of franchise agreement. The Fifth Circuit states that it "does not address" the issue of breach, yet, breach is a cornerstone of this case. In another oversight, the Fifth Circuit stated that Petitioner offered "no credible evidence to support the jury's finding that Dunkin' caused Yankee to suffer damages." However, Dunkin's own store evaluations showed that the WZ was the lowest of all Dunkin' zones in terms of sanitation, quality control, appearance and service (*i.e.*, "standards"). Evidence also showed that a direct relationship exists between store standards and store sales, and that a straight-line relationship exists between increased advertising and increased sales. In concept, this evidence is obvious; customers prefer to patronize well-operated stores and to avoid those that are poorly operated. Taken together, the evidence proved that low standards caused low sales in WZ stores and low sales caused loss of advertising dollars (advertising fees are a percentage of store sales) and less advertising dollars, in turn, caused a straight-line reduction in

Yankee's sales. Further, Dunkin's confiscation of WZ advertising money further caused direct damage to Yankee as it did to all other WZ stores. The question now posed is whether the Fifth Circuit's failure to view such overwhelming evidence in the light most favorable to the jury's verdict can stand as a basis for overturning the district court's judgment on such an important, far-reaching case where the fate of hundreds of Dunkin' franchisees rides in the balance.

Yankee's expert witness on franchising practices in America, Harold Brown, explained that "high and uniform standards" are "the very substance of being a franchisee." Provided franchisees receive those high and uniform standards, it is fair to pay franchise fees. Fees exchanged for service is the intended business basis of Dunkin's franchise contracts.

The lengthy franchise agreement is entirely a statement of the francisee's responsibilities and, except for paragraph 3c, there is *no other promise made by the Dunkin' to its franchisees.* Removing this single paragraph removes *all* obligations of Dunkin' to franchisees. Heretofore, the franchise agreement will be totally one-sided and lacking in mutuality, because now Dunkin' *may* provide services to protect the franchise value, but is clearly not *required* to do anything at all.

The Fifth Circuit has completely redefined the consideration that franchisors owe to franchisees. By holding that the standards sustained across a broad geographic region surrounding Yankee do not, *per se*, adversely impact Yankee or, at least, are not prima-facia evidence of damages to Yankee, the Fifth Circuit is permitting Dunkin' to continue its pattern of neglect. Yankee must continue to pay franchise fees but Dunkin' is no longer obligated to "ensure high and uniform standards." Yankee is no longer receiving the benefit of the bargain. Now too, according to the Fifth Circuit's opinion, Dunkin' can continue this behavior

with impunity not just towards Yankee but also towards the other franchisees of the WZ, thus redefining many longstanding contracts.

The Fifth Circuit concluded that Yankee presented nothing more than a claim for breach of contract, which in no way involved misrepresentation or unconscionability. This reasoning simply ignores the record as well as the dominance, superior knowledge and proven intent of Dunkin'. Numerous deceptions were proven, obvious and damaging. One particular deception was so flagrant that it is repeated to this Court. That deception involves Dunkin's confiscation of WZ advertising funds which Dunkin' has steadfastly denied ever occurred, but in documents Dunkin' distributed to franchisees, as well as witness testimony, the proof is shown. The act of confiscation of advertising funds directly caused damages to Yankee and all other WZ franchisees and, given the poor state of the WZ, was both deceptive and unconscionable. Other deceptions were just as odious, such as Dunkin's denying it had a strategy to vacate the WZ, denying serious and damaging reductions in store visitations, communications, inspections, quality control, appearance, sanitation, service, *etc.*, denying WZ personnel reductions were more than 22% when, in fact, the reduction was virtually 91%, denying the existence of exit markets, forbidding new franchise store development, and denying a conspiracy to exit WZ markets. Deceptions, in fact, form the basis of Dunkin's presentments to the various courts in this case.

Dunkin's duty to maintain minimal commercial and sanitation standards within its franchisee stores for the contract duration regardless of its growth strategy is a central issue of this dispute. Certainly a profitable franchisor should be held to honor its contract promises when that franchisor alone authors the franchise agreement without negotiating the terms and wherein the essential terms are set in concrete. Dunkin's decision

to vacate the WZ is completely documented by its own records, and was precipitated by Dunkin's admittedly "marginal" profits in the WZ compared to high profits elsewhere. So, at a time when Dunkin' enjoyed historically high profits and despite the fact that it had signed 20 year service contracts with its WZ franchisees and, despite that it knew that damages would result when it removed 91% of its WZ support personnel, Dunkin' effectively pulled the rug from underneath its WZ franchisees who had contracted for, paid for, and desperately needed services, advice, communications, inspections, and in-store training. Dunkin' ceased all of these services, forbade new franchise store development and even diverted advertising money from the WZ to the rich NEZ areas, totally guaranteeing a rapid decline of sales and operations in WZ stores.

If Dunkin' has standing in law to vacate its franchise contracts by deciding arbitrarily to grow in one area and decline or exit another area, and in doing so, to shut down all support, training and logistics for franchisees of the exited regions, then a total mockery is made of the franchise agreement. Precisely as it has done in the WZ, Dunkin' can promise anything today because tomorrow it may choose to leave, thus stranding its franchisees and leaving them without recourse, especially without recourse through the courts. Dunkin' can take up-front money today and then leave tomorrow, thus depriving its franchisees of the fruits of their contracts. Exploiting this legal strategy would permit franchisors to escape every unsavory contract or market condition they might encounter.

If the Fifth Circuit's decision is upheld, no franchise company will ever have to earn its pay again. Franchising is the single biggest industry in America and perhaps the most diverse. It is a trillion-dollar industry that includes most fast food and large scale restaurant chains, automobile dealerships, sports franchises and many business service chains. Franchising

touches everyone in America. If the Fifth Circuit's logic were to be extended beyond Dunkin' to some or all of the remaining franchising community, the result would certainly be detrimental to commerce in the United States and to all contract law.

REASONS FOR GRANTING THE WRIT

I.

THE FIFTH CIRCUIT FAILED TO RECOGNIZE THAT A FRANCHISE NAME, REPUTATION AND GOODWILL HAVE AN INHERENT VALUE IN WHICH FRANCHISEES HAVE AN INTEREST.

The franchise system plays a significant role in the economy of the United States. The very essence of a franchise agreement is that a franchisee, in exchange for the right to utilize and benefit from the franchisor's name, reputation and proven procedures for producing standardized fare, makes payment to the franchisor, usually in the form of royalty payments. A franchise license confers the attendant rights to operate a business in the prescribed manner and to benefit from the goodwill of the trade name. *See Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955, 92 S. Ct. 1172, 31 L. Ed. 2d 232 (1972). This symbiotic relationship should work to the benefit of all parties involved. The system enables franchisees to go into business with significantly lower barriers to entry, and the franchisor realizes a financial benefit from the payment of franchise fees and royalties. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). One of the fundamental aspects of the franchise system is that the franchise offers uniform and consistent quality to the customer, who comes to expect a certain level of quality and associates that level of quality with all stores operating under

the umbrella of the franchise name. Uniformity and consistency are thus at the heart of the franchise scheme. Under the franchise agreement at issue in this case, Dunkin' retains the right and responsibility to monitor all franchisees to insure compliance with high standards. This pervasive franchisor supervision and control benefits the franchisee in turn. His business is identified with a network of stores whose very uniformity and predictability attracts customers. As the court recognized in *Principe v. McDonald's Corp.*, 631 F.2d 303 (4th Cir. 1980), *cert. denied*, 451 U.S. 970, 101 S. Ct. 2047, 68 L. Ed. 2d 349 (1981),

> the modern franchisee pays not only for the right to use a trademark but for the right to become a part of a system whose business methods virtually guarantee his success. It is often unrealistic to view a franchise agreement as little more than a trademark license.

A trademark symbolizes business good will. *Beech Nut-Packing Co. v. P. Lorillard Co.*, 273 U.S. 629, 632, 47 S. Ct. 481, 71 L. Ed. 810 (1917). "There is no property in a trademark apart from the business or trade in connection with which it is employed." *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 39 S. Ct. 48, 63 L. Ed. 141 (1918). Thus, the very essence of what franchisees are purchasing is the right to operate under the good name of the franchise and to enjoy the good will associated with the franchise reputation. If the franchisor allows the good name or reputation of the franchise to be diminished or destroyed, the franchisor destroys the very value of what the franchisee has purchased through the franchise agreement.

The franchise system often works well as long as the parties involved honor the tenants of the franchise agreement. However, when a franchisor breaches its agreement to maintain "high and

uniform standards"[1] as the jury found that Dunkin' did in the instant case, all franchisees in the area where the breach occurred suffer as a result of the franchisor's breach. However, because the right, the ability and the responsibility for quality control of other franchisees remains with the franchisor, when the franchisor fails or refuses to fulfill its obligation, individual franchisees such as Petitioner are adversely effected, but are left without the means of preventing the harm. Now, as a result of the Fifth Circuit's opinion in this matter, they are also left without a legal remedy.

II.

THE DECISION OF THE FIFTH CIRCUIT EFFECTIVELY DENIES RELIEF TO FRANCHISEES WHO OPERATE IN A FRANCHISE REGION THAT HAS BEEN DAMAGED OR DESTROYED BY THE ACTIONS OF THE FRANCHISOR.

The Fifth Circuit erred when it labeled as "suspect" Yankee's contention that it was damaged by Dunkin's virtual cessation of services and monitoring in the WZ. It is so fundamental as to be axiomatic that one of the primary benefits for which a franchisee pays franchise fees is the right to operate under the good name of the franchise and benefit from the reputation and consumer goodwill associated with the trademark's reputation. If that name is besmirched by other franchisees operating in a substandard

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1. In paragraph 3c of the franchise agreement entered between petitioner Yankee Enterprises, Inc. and Respondent Dunkin' Donuts, Dunkin' Donuts promised to

> . . . maintain high and uniform standards of quality, cleanliness, appearance and service at all Dunkin' Donuts shops, thus, protecting and enhancing the reputation of Dunkin' Donuts and demand for the products of the Dunkin' Donuts System.

manner and turning out an inferior product (and there was abundant evidence at trial to establish that such was the case) then all franchisees operating in the affected area will suffer. In fact, prevailing low standards were shown within Yankee's immediate market as well as north, south, east and west for hundreds of miles surrounding Yankee.

The Fifth Circuit erred when it found that a franchisor's failure to maintain franchise standards was "no evidence" of damage to franchisee, particularly when the franchisee brought forth expert testimony showing that franchisee profits were significantly less than the profits that would have occurred but for the actions of the franchisor. It is important to remember that the Fifth Circuit stated it found "no evidence of damages," and it did not hold that there was "no evidence of breach."

Petitioner offered documentary evidence completely authored and disseminated by Dunkin' which established that *low store standards directly cause low store sales*. Obviously, lower sales regionally result in less advertising regionally and even lower sales and profits *at all stores in the region*. The Fifth Circuit disregarded the evidence supporting the jury's finding, and impermissibly substituted its own opinion on the credibility of the witnesses for that of the jury, completely disregarding in its opinion the Dunkin'-authored graphs, charts, and executive testimonials, which all pronounced a direct and powerful link between store standards and store sales.

Probing continuously through discovery and trial cross examination, Dunkin' was never able to fault Yankee or any Beaumont market factors for the sales decline of Yankee's store. The explanation for the sales trend differences of Yankee versus NEZ was that only in the NEZ did Dunkin' keep its promises of appropriate advertising and high standards. In the WZ, it did not. Additionally, Yankee's store was similar to those of NEZ in

many important aspects and Yankee's average sales once exceeded the NEZ average sales. For these reasons, and also because Dunkin' had "poisoned the well" for hundreds of miles around Yankee's store, for lost profits analysis, Yankee had to go to the nearest comparable "clean" market, which was the NEZ. It is hard to imagine what type of evidence would be more credible, reliable or persuasive than a comparison of Petitioner's sales with those of like stores within a region of the country where Respondent had actually fulfilled its obligations to maintain "high and uniform standards."

Dunkin' Donut stores, when operated in close compliance with the franchise agreement, as Yankee's store always has been, are very much alike and should appear to be identical. Thus, comparison of Petitioner's store with other stores operating in a region uneffected by the breach gave the jury a yard stick by which to measure the sales that Petitioner should have achieved, but for Respondent's breach. It would of course have been unenlightening, and ultimately useless, to compare Petitioner's sales history with the record of other franchisees within the WZ, where Petitioner operates. All West and Central zone franchisees operating in compliance with the franchise guidelines were similarly and adversely effected by Respondent's failure to maintain standards within the West and Central Zones.[2] It was also undisputed that Petitioner's store had consistently performed in the top 1% of all Dunkin' stores operationally, in complete compliance with the franchise agreement and, further, no internal store or market conditions were discovered to explain Yankee's sales decline versus the NEZ. Thus, the Fifth Circuit's rejection of the evidence presented by Petitioner on damages is

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2. In fact, Dunkin's disregard of its obligations in the WZ was shown to have existed for years, even predating the time period for which recovery was sought in this suit. This longstanding disparity between Dunkin's treatment of the WZ and NEZ explains the "gap" in weekly sales that exists between the regions.

a rejection of the best, and possibly the only, evidence available to demonstrate damages suffered by an individual franchisee operating in an area where the entire region has been adversely effected by the wrongful actions of the franchisor.

III.

LOST PROFITS ARE PROPERLY AWARDED WHEN THE PARTY SEEKING RECOVERY BRINGS FORTH EVIDENCE THAT ITS GROSS SALES HAVE BEEN ADVERSELY EFFECTED IN COMPARISON WITH OTHER FRANCHISEES IN UNAFFECTED REGION.

Lost profits are properly awarded where the evidence establishes that the Plaintiff has suffered substantial damages. A plaintiff "need not prove that the defendant's wrongful actions were the sole producing cause of the injuries suffered." The plaintiff must only show that, as a matter of fact and with a fair degree of certainty, the defendant's wrongful conduct materially contributed to the injury. *See Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 20 (5th Cir. 1974), *cert. dismissed*, 419 U.S. 987 (1974). In this case, lost profits were shown by a comparison of Yankee's average sales over time to the average sales of stores in the NEZ. This "yardstick test" of measuring the injured party's lost profits against those of a comparable business is an established and acceptable manner of measuring lost profits. *See Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 667 (5th Cir. 1974). When utilizing the "yardstick" method, allowances can be made for differences between the companies, but it is best if the business used as a standard for comparison be closely comparable to the Plaintiffs. *Id.* at 667. In this case, an average of NEZ stores was used, which would account for any unusual events or discrepancies, that may have effected an individual store. Using an average was more than fair, since Petitioner was always shown to be a top store within its region.

The Fifth Circuit's rejection of this method of measuring lost profits resulted in manifest unfairness to Petitioner, who, by virtue of Respondent's actions, was left with no other businesses that formed a valid basis of comparison. Under Texas law, recovery of lost profits does not require that lost profits be susceptible to exact calculation. *Associated Indemnity Corporation v. CAT Contracting, Inc.*, 918 S.W. 2d 580 (Tex. App. — Corpus Christi 1996, no writ). Lost profits may be established with reasonable certainty through the introduction of evidence such as economic and financial data, market, surveys and analyses, business records of similar enterprises, and — of course — expert testimony to assist the jury in comprehending it all. *Maher v. Continental Cas. Co.*, 76 F.3d 535, 541 (4th Cir. 1996). Opinions or estimates of lost profits are competent evidence of lost profits if based on objective facts, figures or data from which the amount of lost profits can be ascertained. If a business for which lost profits are sought is shown to be an ongoing business, evidence of that business's historical profits at time of breach is admissible to show lost profits. *First Southern Trust Company v. Szczepanik*, 880 S.W. 2d 10, (Tex. App. — Dallas 1993), *reversed on other grounds*, 883 S.W. 2d 648 (Tex. 1994).

Petitioner proved its lost profits by comparing its history of profits to the history of stores in the uneffected NEZ. The basis for the comparison was actual weekly sales, an objective figure which was actually supplied by Respondent. The causal nexus that is required between damages sued for and the conduct of Defendant is met when the jury is presented with pleadings and proof that establish a direct causal link between the damages awarded, the actions of Defendant and the injuries suffered. *Hanes & Boone v. Bowser, Bouldin Ltd.*, 896 S.W. 2d 179 (Tex. 1995). In this case, the casual link is supported by the very contract breached; the franchise agreement in paragraph 3c recognizes that lower standards lead to lower demand for

Dunkin' products, which of course leads to lower sales and lower profits. The evidence and testimony were clear that Dunkin' had aggravated problems in the WZ as early as 1986. In truth, Dunkin' was always playing catch-up in the WZ and standards and advertising practices were always different from, and substandard to, those practices in the NEZ as far back as 1986. Petitioner did not discover this "continuing breach" of contract until 1994.

Even if a gap did exist in 1989 or 1990 between the NEZ and WZ and even if Yankee had no explanation for such a gap (which is has), it is clear that the actions of Dunkin' would have created a wider gap thereafter. The record shows very different treatment of the NEZ and WZ by Dunkin'. This polarized pattern had to produce sales and profit differences and surely was an "exciting" or "contributing" cause to WZ sales slide, causing Yankee consequental harm. Although damages may not be determined by mere speculation or guess, it will be enough if evidence shows the extent of damages as a matter of just and reasonable inference, although the result may be only approximate. *DSC Communications Corp v. Next Level Communications*, 107 F.3d 322 (5th Cir. 1997). It is conjecture and surmise to suggest that market and demographic factors "may have" caused the sales trend differences between Yankee and the NEZ. However, it is crystal clear that removing advertising funds and letting slide all standards of quality, service, cleanliness, and appearance over a broad area for a lengthy period of time will cause serious sales declines, loss of market share and store failures. This is exactly what happened in the WZ, causing Yankee damage.

Because the determination of whether lost profits can be ascertained with "reasonable certainty" for purposes of a claim for lost profits is intended to be flexible enough to accommodate the myriad circumstances in which claims for lost profits arise,

Document Imaging, Inc. v. IPRO, Inc., 952 F. Supp. 462 (S.D. Tex. 1996), and because Petitioner presented objective proof of lost profits as measured by an acceptable and appropriate methodology, the Fifth Circuit's reversal of the award of damages to Petitioner is in error. Because of the manifest injustice caused by the Fifth Circuit's ruling and because of its potential adverse impact on commerce in this country, the Fifth Circuit's opinion requires correction.

CONCLUSION

Because its reasoning presents no legitimate basis to overturn the district court's judgment awarding damages to Petitioner for Respondent's breach of franchise agreement, and because the opinion misapplies the law for establishing lost profits in a breach of contract case, the opinion of the Fifth Circuit requires correction. The Fifth Circuit's opinion has grim implications for the many franchisees operating under nearly identical franchise agreements, and in effect, universally renders franchise agreement provisions requiring franchisors to maintain high franchise standards unenforceable by franchisees. Thus, this case presents a matter of grave and far reaching proportion. Petitioner respectfully requests that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JULY 8, 1997

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 96-40735

YANKEE ENTERPRISES, INC.,

Plaintiff-Appellant-Cross-Appellee,

VERSUS

DUNKIN' DONUTS, INC.,

Defendant-Appellee-Cross-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(1:95-CV-136)

Before KING, DAVIS and DeMOSS, Circuit Judges.

DAVIS, Circuit Judge:*

In this litigation between a franchisor and a franchisee, which resulted in a verdict in favor of the franchisee, we consider the propriety of the district court's post verdict orders rejecting the jury's award under the Texas Deceptive Trade Practices Act ("DTPA") and entering judgment against the franchisor on

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.

franchisee's breach of contract claim. For the reasons that follow, we conclude that the evidence will not support any award in franchisee's favor.

I.

Dunkin' Donuts Incorporated ("Dunkin' ") is a franchisor that franchises donut shops nationwide. Yankee Enterprises ("Yankee") is a Dunkin' franchisee that operates a Dunkin' Donuts store in Beaumont, Texas. Dunkin' divides the nation into five zones: Northeast, Midwest, Mid-Atlantic, Southeast, and West. Beaumont, Texas, is located in Dunkin's West zone. In 1986, Yankee, a Dunkin' franchisee since 1972, renewed its franchise for twenty years. According to the franchise agreement, Dunkin' promised to "continue its efforts to maintain high and uniform standards of quality, cleanliness, appearance and service at all Dunkin' Donuts shops."

In 1994, Yankee brought suit against Dunkin', asserting that Dunkin' had breached the franchise agreement and violated the DTPA. Yankee contended that Dunkin' had reduced personnel in the West zone, failed to properly supervise franchises in the West zone, and diverted resources and attention away from the West zone to the Northeast zone. According to Yankee, these actions constituted a breach of the franchise agreement — in particular, Dunkin's pledge to "continue efforts" to maintain standards — and a violation of the DTPA.

A jury found that Dunkin' had failed to comply with the franchise agreement and had committed violations of the DTPA; accordingly, the jury awarded Yankee damages. Yankee moved for entry of judgment on the verdict, and Dunkin' moved for judgment as a matter of law. The court granted Dunkin's motion

on the DTPA claim, but rejected Dunkin's motion on the breach of contract claim and entered judgment on the verdict on this claim. Both parties appealed. We consider their arguments below.

II.

Yankee first argues that the district court erred in granting Dunkin's motion for a judgment as a matter of law on Yankee's DTPA claim. The jury found that Dunkin' violated § 17.46 of the DTPA by engaging in "[f]alse, misleading, or deceptive act or practices in the conduct of any trade or commerce" and that Dunkin violated § 17.50 of the DTPA by engaging in "unconscionable" activities.

Yankee argues that the record supports the verdict on its § 17.46 misrepresentation claim. According to Yankee, Dunkin' violated its promise to maintain standards of cleanliness, quality, and appearance in the West zone by drastically reducing personnel in the West zone, cutting back supervision of the West zone, and diverting its financial resources away from the West to the Northeast zone. In essence, Yankee argues that Dunkin's conduct demonstrates that it misrepresented its intention to perform under the contract. As the Supreme Court of Texas stated in *Crawford v. Ace Sign, Inc.*, 917 S.W.2d 12, 14-5 (Tex. 1996), "[t]o accept this reasoning, however, would convert every breach of contract into a DTPA claim." *Crawford* instructs that a claim only for breach of contract is insufficient to violate § 17.46(a) of the DTPA. *Crawford,* 917 S.W.2d at 14-5. We conclude that Yankee presented nothing more than a claim for breach of contract in support of its § 17.46(a) misrepresentation action. Accordingly, we affirm the district court's order setting aside the jury's verdict on the misrepresentation prong of the DTPA claim.

Yankee also argues that the district court erred in setting aside the jury's finding that Dunkin' engaged in unconscionable activity that was the producing cause of Yankee's damages in violation of § 17.50 of the DTPA. The two means of engaging in unconscionable conduct under the DTPA are: (1) taking advantage of the lack of knowledge, ability, experience, or capacity of a person to a *grossly unfair degree;* or, (2) taking action which results in *a gross disparity* between the value received and consideration paid, in a transaction involving transfer of consideration. See Tex. Bus. & Com. Code Ann § 17.45.

Yankee asserts that a gross disparity exists between the franchise it received and the consideration it paid because Dunkin' did not maintain the standards of quality, cleanliness, and appearance promised in the franchise agreement. We reject this claim, without deciding whether Dunkin' did indeed fail to maintain the standards Yankee contracted for, because Yankee produced no evidence of the value of franchise it received. With no evidence of the value received, the jury could not determine that there was a gross disparity between the consideration paid and the value received.

Yankee also contends that Dunkin used its superior bargaining power to take advantage of Yankee to a grossly unfair degree. Under the DTPA it is insufficient for Yankee to show that Dunkin' treated Yankee unfairly; Yankee must show that the unfairness was "glaringly noticeable, flagrant, complete, and unmitigated." *Chastain v. Koonce,* 700 S.W.2d 579, 583 (Tex. 1985). Our review of the record convinces us that any unfairness suffered by Yankee did not rise to the level of gross unfairness. Thus, we also affirm the district court's order setting aside the

jury's verdict for Yankee on the unconscionability prong of the DTPA claim.[1]

III.

On cross-appeal, Dunkin' contends that Yankee presented no competent evidence to support the jury's finding that Dunkin's breach of the franchise agreement caused Yankee to suffer damages.[2] Yankee argued at trial that Dunkin' had breached its promise in the franchise agreement to "continue efforts to maintain high and uniform standards of quality, cleanliness, appearance and service at all Dunkin' Donut shops." More particularly, Yankee argued that Dunkin' diverted its attention and resources to the Northeast and failed to continue efforts in the West zone, where Yankee was located, and this failure caused Yankee to lose sales.

Yankee began with a suspect causation theory: The reduced standards of cleanliness in the other stores in the West zone damaged Yankee's sales even though Yankee's store met or exceeded the high standards in place prior to the alleged breach.[3]

1. The district court's money judgment in favor of Yankee included the sum of $132,070 awarded by the jury as part of Yankee's DTPA claim. This was apparently an oversight by the district court because including this award is inconsistent with its order setting aside the jury's verdict on Yankee's DTPA claim.

2. Dunkin also argues that there is insufficient evidence to support the jury's conclusion that it breached the franchise agreement. Because we conclude that jury verdict must be reversed on other grounds, we do not address this issue.

3. Another Dunkin' franchisee testified that a customer who had a bad experience in another Dunkin' shop in the West zone may not stop at

(Cont'd)

In support of this contention, Yankee produced the testimony of John Croley, its expert witness on damages. Although Yankee contended that Dunkin's breach began in 1989 or 1990, Croley compared Yankee's average weekly sales for the years 1984 through 1996 to the sales of the average store in the Northeast zone. Croley testified that Yankee's store was comparable to that of the average store in the Northeast zone because in 1984 Yankee's average weekly sales were only $229 less than the average weekly sales of the Dunkin franchises located in the Northeast zone. Croley testified that the difference in sales between the "comparable" Northeastern stores and Yankee's store increased from 1984 through 1996. He attributed this increased difference to Dunkin's failure to continue its efforts to maintain high standards in the West zone.

But Yankee's expert did not fare well in cross examination. First, the "gap" between the comparable Northeast store and Yankee's store existed at least four years before Dunkin's breach, which allegedly occurred in 1989 or 1990. It is obvious, and Croley admitted, that the diminution in sales that occurred from 1984 through 1988 cannot be attributed to an event that took place in 1989. The expert also admitted he did not consider a number of factors (other than the difference in standards between Northeast stores and West stores) that could account for the "gap." These factors include, but are not limited to, a difference in management skill between the hypothetical Northeast store and Yankee's store; a difference in market penetration; and a difference in volume of advertising.

(Cont'd)

a Dunkin shop while driving through Beaumont. Other than this vague testimony we find no support for Yankee's theory that reduced standards in other shops in the West caused a substantial sales reduction in Yankee's shop. No proof was presented to explain or substantiate the details of this theory.

In sum, Croley's theory, that Dunkin's breach caused the "gap," is nothing more than conjecture and surmise. Because we conclude that Yankee has produced no credible evidence that the damages claimed are causally related to Dunkin's alleged breach of contract, the judgment predicated on breach of the franchise agreement cannot stand.

IV.

We conclude that the evidence is insufficient to support the jury's finding that Dunkin' engaged in conduct that violated the DTPA. We therefore affirm the district court's order setting aside the jury verdict on those claims. We also conclude that there is no credible evidence to support the jury's finding that Dunkin's alleged breach of contract caused Yankee to suffer damages.[4] Accordingly, we reverse the judgment entered on the breach of contract claim and render a take nothing judgment in favor of Dunkin'.

AFFIRMED in part, REVERSED and RENDERED in part.

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4. It follows from the rejection of Yankee's breach of contract claim that the district court correctly denied Yankee's claim for attorneys fees.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION FILED JULY 16, 1996

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. 1:95CV136

YANKEE ENTERPRISES, INC.

VS.

DUNKIN' DONUTS INC.

JUDGMENT

On the 22nd day of April, 1996, came on to be heard the above-entitled and numbered cause and Yankee Enterprises, Inc., the Plaintiff, appeared by and through Gregory Nelson and Sandy Nelson, and by attorney of record and announced ready for trial and the Defendant, Dunkin' Donuts, Inc., appeared by and through its corporate representatives and by attorneys of record and announced ready for trial, and the action came on for trial before the Court and a jury, Honorable Joe J. Fisher, District Judge, presiding. The issues having been duly tried and the jury having duly rendered its verdict, and upon consideration of Defendant's Motion for Judgment as a Matter of Law, and of Defendant's Motion for a New Trial, and of Plaintiff's Motion Requesting an Award of Attorney's Fees, and of Plaintiff's Motion for Reconsideration of the Court's Decision Denying Plaintiff's Attorney's Fees, and of Defendant's Motion for Attorneys' Fees and Costs Pursuant to Section 17.50(c) of the Texas Deceptive Trade practices Act, all oppositions to the

motions, the arguments of counsel, and the Court's Order of July 10, 1996, on Defendant's Motion for Attorneys' Fees and Costs Pursuant to Section 17.50(c) of the Texas Deceptive Trade Practices Act and the Court's Amended Order of July 16, 1996, on Plaintiff's Motion for Reconsideration of the Court's Decision Denying Plaintiff's Attorney's Fees, and it is hereby

ORDERED AND ADJUDGED that judgment be rendered in favor of the Plaintiff, Yankee Enterprises, Inc., on Interrogatory Nos. 1, 4 and 5 of the jury verdict and that Plaintiff, Yankee Enterprises, Inc., recover of the Defendant, Dunkin' Donuts, Inc., actual damages in the sum of $620,158.00, together with the sum of $84,754.92, for prejudgment interest, calculated at 10%, compounded annually, as provided by law; and it is further

ORDERED AND ADJUDGED that Plaintiff, Yankee Enterprises, Inc., recover of the Defendant, Dunkin' Donuts, Inc., its costs of court; and it is further

ORDERED AND ADJUDGED that the judgment here entered shall bear interest at the rate of 5.62% from the date the judgment is signed until paid; and it is further

ORDERED AND ADJUDGED that the verdict of the jury as set forth in its answers to Interrogatory Nos. 2, 3, 6, and 7 is hereby set aside; and it is further

ORDERED that Defendants, Dunkin' Donuts' Motion for Judgment as a Matter of Law with respect to Plaintiff, Yankee Enterprises, Inc.'s claims under the Texas Deceptive Trade Practices Act is GRANTED and judgment is entered in favor of Defendant on all such claims; and it is further

Appendix B

ORDERED AND ADJUDGED that Defendant, Dunkin' Donuts' Motion for Judgment as a Matter of Law with regard to Plaintiff's breach of contract cause of action is DENIED; and it is further

ORDERED AND ADJUDGED that Defendant, Dunkin' Donuts' Motion for a New Trial be in all things DENIED; and it is further

ORDERED AND ADJUDGED that Plaintiff's Motion requesting an award of attorney fees is hereby DENIED; and it is further

ORDERED AND ADJUDGED that Plaintiff's Motion for Reconsideration of the Court's Order Denying its Request for an Award of Attorneys Fees is DENIED; and it is further

ORDERED AND ADJUDGED that Defendant's Motion for Recovery of Attorney Fees and Costs pursuant to Section 17.50(c) of the Texas Deceptive Trade Practices Act is in all things DENIED.

All relief not expressly granted herein is DENIED.

Signed this 16 day of July, 1996.

s/ Joe J. Fisher
JUDGE PRESIDING

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED AUGUST 11, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-40735

YANKEE ENTERPRISES INC

Plaintiff - Appellant-Cross-Appellee

v.

DUNKIN' DONUTS INC

Defendant - Appellee-Cross-Appellant

Appeal from the United States District Court for the Eastern District of Texas, Beaumont

ON PETITION FOR REHEARING

Before KING, DAVIS, and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is *denied.*

ENTERED FOR THE COURT:

s/ illegible
United States Circuit Judge

Supreme Court, U.S.
FILED
DEC 12 1997
CLERK

No. 97-797

In the
Supreme Court of the United States
October Term, 1997

YANKEE ENTERPRISES, INC.,
Petitioner,

vs.

DUNKIN' DONUTS INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Dunkin' Donuts Incorporated

December 12, 1997

18 pp

STATEMENT PURSUANT TO RULE 29.6

On January 2, 1990, Dunkin' Donuts Incorporated became an indirect wholly owned subsidiary of Allied Domecq PLC. Allied Domecq is a publicly traded United Kingdom company primarily engaged in the drinks and food business. Allied Domecq's principal place of business is 24 Portland Place, London, England. Dunkin' Donuts is part of and reports to an unincorporated division called Allied Domecq Retailing USA. Allied Domecq Retailing USA's principal place of business is 14 Pacella Park Drive, Randolph, Massachusetts 02368.

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STATEMENT OF THE CASE

This action was filed by Yankee Enterprises, Inc., a Dunkin' Donuts franchisee, in the United States District Court for the Eastern District of Texas on March 13, 1995. On April 1, 1996, Yankee filed its Second Amended Complaint. Its claims were for breach of contract, violations of the Texas Deceptive Trade Practices-Consumer Protection Act, Tex. Bus. & Com. Code Ann. §§ 17.41 - 17.63 (1987) (the "DTPA"), and fraud. On April 11, 1996, the District Court, the Honorable Joe J. Fisher, granted Dunkin's motion for summary judgment on Yankee's fraud claim. Record 1499.

A jury trial was held on April 29-May 8, 1996. The jury's verdict was in favor of Yankee, finding that Dunkin' had "failed to comply with the Franchise Agreement" and had committed violations of the DTPA. Dunkin's post-trial motion for judgment as a matter of law was granted in part and denied in part. The district court granted Dunkin' judgment on Yankee's DTPA claims but let stand the breach of contract verdict. Dunkin's motion for a new trial was denied, as was Yankee's motion for an award of attorneys' fees and costs. Record 2536.

The United States Court of Appeals for the Fifth Circuit affirmed the district court's order setting aside the jury verdict on Yankee's DTPA claims.[1] The Fifth Circuit also found "no credible evidence" to support the jury's finding that Dunkin's alleged breach of contract caused Yankee to suffer damages, and therefore reversed the judgment entered on the breach of contract claim and rendered a take nothing judgment in favor of Dunkin' Donuts.

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[1] Yankee is not petitioning from the Fifth Circuit's affirmance of the denial of its DTPA claims. Yankee never mentions the DTPA in its Questions Presented; it is not cited to in its Table of Citations; and it is not discussed in the Argument section of its petition.

REASONS FOR DENYING THE WRIT

I. THE BASIS FOR THE FIFTH CIRCUIT'S FINDING THAT YANKEE PRESENTED "NO CREDIBLE EVIDENCE" OF CAUSATION OF DAMAGES IS NOT ADDRESSED IN YANKEE'S PETITION, IS NOT ERRONEOUS, AND DOES NOT PRESENT AN ISSUE THAT IS IN NEED OF REVIEW BY THIS COURT.

The franchise agreement provision at issue was Dunkin' Donuts' promise to "continue its efforts to maintain high and uniform standards of quality, cleanliness, appearance and service at all Dunkin' Donuts shops." Pl. Ex. 2 at ¶ 3.C. Yankee claimed that Dunkin' had breached the agreement by taking certain actions that led to less shop cleanliness in the west, although not in Beaumont, Texas (where Yankee's shop is located and shop cleanliness remained high (tr. at 220, 268)), and lost profits for Yankee. Yankee presented a number of franchisees to testify that they had observed unclean shops at various locations throughout the west, but all of them admitted they had "no idea," "wouldn't have a clue," or "couldn't tell you" whether what they observed could have damaged Yankee. Tr. at 542, 585, 608. This included Yankee's president, Greg Nelson, who testified when asked to explain his own sales decline (which did not even occur until two years after the alleged breach): "I'm at a complete loss to understand it." Tr. at 298-99.

While Yankee's petition discusses a variety of reasons why it believes it proved that a breach occurred, that issue is not even before this Court because the Fifth Circuit never reached the question of breach, as it stated: "Dunkin' also argues that there is insufficient evidence to support the jury's conclusion that it breached the franchise agreement. Because we conclude

that [the] jury verdict must be reversed on other grounds, we do not address this issue." Pet. at 5a n.2.

Instead, the Fifth Circuit's opinion was based on its decision that "Yankee has produced no credible evidence that the damages claimed are causally related to Dunkin's alleged breach of contract," and that Yankee's theory that the alleged breach caused it to suffer damages "is nothing more than conjecture and surmise." Pet. at 7a. There are a number of reasons for this ruling, but first and foremost is the fact that Yankee's damages "expert"[2] testified that a breach that allegedly occurred in 1989 or 1990 caused damages that began to accrue *six years earlier*, in 1984 -- *a fact that is not mentioned at all in Yankee's petition.* The Fifth Circuit devotes an entire section of its opinion to a detailed discussion of the basis for its ruling. We reproduce it because it is dispositive of (yet ignored by) Yankee's petition:

> Yankee argued at trial that Dunkin' had breached its promise in the franchise agreement to "continue efforts to maintain high and uniform standards of quality, cleanliness, appearance and service at all Dunkin' Donut shops." More particularly, Yankee argued that Dunkin' diverted its attention and resources to the Northeast and failed to continue efforts in the West zone, where Yankee was located, and this failure caused Yankee to lose sales.
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> *Yankee began with a suspect causation theory*: The reduced standards of cleanliness in the other stores in the West zone damaged Yankee's sales even though

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[2] Yankee's expert was John Croley, a Beaumont accountant and lawyer who proffered no training or experience in lost profits analysis, but had "hands-on" experience doing accounting and sales for a meat company and a restaurant. Tr. at 383-87. He had never been qualified as an expert in any area (tr. at 387), and was admitted as an expert over objection (tr. at 414).

Yankee's store met or exceeded the high standards in place prior to the alleged breach.[3] In support of this contention, Yankee produced the testimony of John Croley, its expert witness on damages. Although Yankee contended that Dunkin's breach began in 1989 or 1990, Croley compared Yankee's average weekly sales for the years 1984 through 1996 to the sales of the average store in the Northeast zone. Croley testified that Yankee's store was comparable to that of the average store in the Northeast zone because in 1984 Yankee's average weekly sales were only $229 less than the average weekly sales of the Dunkin' franchises located in the Northeast zone. Croley testified that the difference in sales between the "comparable" Northeastern stores and Yankee's store increased from 1984 through 1996. He attributed this increased difference to Dunkin's failure to continue its efforts to maintain high standards in the West zone.

But Yankee's expert did not fare well in cross examination. *First, the "gap" between the comparable Northeast store and Yankee's store existed at least four years before Dunkin's breach, which allegedly occurred in 1989 or 1990. It is obvious, and Croley admitted, that the diminution in sales that occurred from 1984 through 1988 cannot be attributed to an event that took place in 1989.* The expert also admitted he did not consider a number of factors (other than the difference in standards between Northeast stores and West stores) that could account for the "gap." These factors include, but are not limited to, a difference in management skill between the hypothetical Northeast store and Yankee's store; a difference in market penetration; and a difference in volume of advertising.

> *In sum, Croley's theory, that Dunkin's breach caused the "gap," is nothing more than conjecture and surmise*. Because we conclude that *Yankee has produced no credible evidence that the damages claimed are causally related to Dunkin's alleged breach of contract*, the judgment predicated on breach of the franchise agreement cannot stand.
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>
> 3. Another Dunkin' franchisee testified that a customer who had a bad experience in another Dunkin' shop in the West zone may not stop at a Dunkin' shop while driving through Beaumont. *Other than this vague testimony we find no support for Yankee's theory that reduced standards in other shops in the West caused a substantial sales reduction in Yankee's shop*. No proof was presented to explain or substantiate the details of this theory.

Pet. at 5a-7a (emphases added) (footnote included).

Thus, the Fifth Circuit rejected -- as it had to -- Yankee's theory that a breach in 1990 caused damages that began to accrue in 1984, as well as Yankee's unsupportable comparison between its sales and those of the average shop in the northeastern part of the country. Yankee does not even attempt to explain why this ruling was wrong, nor could it.[3] Its own

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[3] Hidden in a footnote, Yankee makes a passing attempt at justifying the "gap" by stating that Dunkin's alleged failure to maintain standards in the west predates the time period for which recovery was sought. Pet. at 13 n.2. Aside from the fact that Yankee's claim was that the breach occurred in 1990, the problem with this argument is that Nelson testified that Dunkin' had fulfilled its contractual obligations up until 1990. Tr. at 239-43.

expert conceded, as the Fifth Circuit found, that there are numerous factors that can affect sales that he did not analyze when calculating what Yankee's sales allegedly should have been (tr. at 424-25), and admitted that a breach in 1990 could not cause damages beginning in 1984 (tr. at 443-44).[4] And finally, while Yankee's claim hinged on a showing that Dunkin's alleged breach caused damage to the entire Western region of the country and, consequently, to Yankee as well -- a "suspect causation theory" as the Fifth Circuit called it -- the undisputed evidence, contained in exhibits introduced by *both* Dunkin' and Yankee, showed that sales in the west *rose* steadily during the years in question. Pl. Ex. 142, Def. Ex. 182.[5] Thus, Yankee misrepresents its own evidence to this Court when it claims that "store sales, profits, . . . were all lower in the WZ" (pet. at 4-5), that there was "a rapid decline of sales and operations in WZ stores" (pet. at 8), and that Dunkin' caused a "WZ sales slide" (pet. at 16). This misrepresentation is repeated no fewer than eleven times in Yankee's petition.[6]

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[4] Yankee's only response in its petition to Croley's dispositive admission on comparability was to state that all Dunkin' shops should appear identical, and thus comparing Yankee's sales to the average Northeast zone sales is appropriate. Pet. at 13. Of course, if this is right, then *every* Dunkin' shop in the country -- and every McDonald's, for example -- should have identical sales and profits as the other shops in the chain, yet another proposition that defies common sense.

[5] Even the other Dunkin' Donuts franchisee in Beaumont experienced steadily rising sales, apparently avoiding the effect on the west that Yankee said had occurred. Tr. at 366-71, Def. Exs. 189, 191.

[6] Pet. at 2, 3, 5, 6, 8, 12, 13, 16.

Yankee does not dispute that the Fifth Circuit was correct when it reviewed the record and found that Yankee had made the impossible claim that a 1990 breach caused damages that started in 1984. But even if it had presented a plausible argument that the Fifth Circuit drew an erroneous factual conclusion from the evidence, that is not the kind of issue that warrants granting a petition for a writ of certiorari. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. Rule 10.

II. THE LAW OF LOST PROFITS IS WELL SETTLED AND DOES NOT NEED TO BE ADDRESSED BY THIS COURT, AND YANKEE MISREPRESENTS THE LAW THAT IS APPLICABLE TO THIS CASE.

Yankee discusses several cases on the law of lost profits. The Fifth Circuit's numerous opinions in this area of the law require no review by this Court. Not only is the law discussed by Yankee well settled, but it has absolutely nothing to do with this case.

First, Yankee quotes a case for a seemingly low standard of proof necessary to establish causation of lost profits. Pet. at 14 (citing *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 20 (5th Cir. 1974)). That standard is confined to antitrust law and is "significantly less arduous than is usually the case in other actions." *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 999 n.113 (5th Cir. 1976) (distinguishing *Terrell* standard from breach of contract actions). *See also Park v. El Paso Bd. of Realtors*, 764 F.2d 1053, 1066-67 (5th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986) ("Under this relaxed burden, a jury verdict may stand on

less evidence than is normally required to support a damage award in civil cases.") (citation omitted). Because this is not an antitrust case, this law is inapplicable.[7]

Second, Yankee attempts to justify its expert's use of the average sales figures of Dunkin' franchises in the northeast by invoking the "yardstick" approach. Pet. at 14. Under that approach, however, Yankee had the burden of proving that the other businesses were "closely comparable to plaintiff's." *Park*, 764 F.2d at 1068; *Caller-Times Publishing Co. v. Triad Communications, Inc.*, 791 S.W.2d 163, 172 (Tex. Ct. App. 1990); *Barbier v. Barry*, 345 S.W.2d 557, 563 (Tex. Civ. App. 1961) (rejecting comparison to third party's profits because of "material difference" between the parties' businesses). A lost profits claim will be rejected if it is based on incomparable statistics from an industry average. *See Cell, Inc. v. Ranson Investors*, 427 S.E.2d 447, 450 (W. Va. 1992). As the Fifth Circuit held, Yankee's expert never established comparability.

Yankee argued this theory to the Fifth Circuit, which correctly disregarded it. While we submit there is *no* theory of lost profits under which a plaintiff could recover damages that begin to accrue six years before the alleged breach, even if Yankee was correct and the Fifth Circuit misapplied the law to the facts, that again would not be cause for this Court to grant the petition. S. Ct. Rule 10.

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[7] Even under the "relaxed burden of proof" for antitrust plaintiffs, an award of lost profits will be struck as speculative if based on unsubstantiated assumptions by the expert witness, such as those made in this case. *Park*, 764 F.2d at 1066-67.

III. YANKEE'S PETITION CONTAINS ISSUES THAT WERE NOT RAISED BELOW, AS WELL AS NUMEROUS MISSTATEMENTS THAT MUST BE IDENTIFIED PURSUANT TO RULE 15.2.

In addition to those previously mentioned, Yankee offers several arguments to this Court that were never raised below. "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). *See also Hormel v. Helvering*, 312 U.S. 552, 556 (1941). These arguments should be rejected for this reason, and for others. Moreover, Supreme Court Rule 15.2 requires Dunkin' to identify any misstatements of fact or law made in the petition. The misstatements of law have been discussed in Section II, above. Identifying all of the misstatements of fact is an impossible task; we will address the major ones.

1. Yankee's first argument is entitled "The Fifth Circuit Failed to Recognize That a Franchise Name, Reputation and Goodwill Have Inherent Value in Which Franchisees Have An Interest."[8] One reason the Fifth Circuit never addressed this question is because it was never presented to it (or, for that matter, to the district court). Although the point of this section of Yankee's petition is not entirely clear, it appears to be that franchisees who are affected by a breach of the standards clause are now left without a remedy due to the Fifth Circuit's opinion. As the Fifth Circuit made clear, however, *assuming* a breach by Dunkin', Yankee failed to demonstrate causation or damages. And although Yankee speaks of its concern that franchisees generally will be left without a remedy by the court's opinion, as we have shown, there was no evidence that western

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[8] This argument appears to be based on Yankee's first Question Presented: "Whether a franchisor owes a duty to franchisees to safeguard and protect the reputation and goodwill of the franchise . . . ."

franchisees suffered damages. Thus, Yankee's point is inapplicable here because it failed to show that it or *anyone* was affected by a breach.

2. The most egregious misrepresentation is Yankee's repeated and reckless allegation that Dunkin' diverted advertising funds from the West zone to the Northeast zone. Pet. at 3, 6, 7, 8, 16. There was no such claim in the case; it was never presented to the jury or included in Yankee's notice of appeal to the Fifth Circuit; and no evidence was submitted in support of it. Indeed, the evidence was directly to the contrary. The Dunkin' Donuts National Advertising Fund ("NAF") is independently audited each year by Peat Marwick, and the results of the audit are published to all franchisees. Tr. at 690, Def. Exs. 117, 118. The actual figures put before the jury showed that when the NAF monies are distributed to the markets for spending each year, Yankee's market receives back *more money than it contributes* to the fund. Tr. at 804-05, Def. Ex. 124.[9] If there were truly evidence that a wrongful diversion of advertising funds had occurred, one might have expected to see a claim to that effect, but there was none.

3. In its Statement of the Case, Yankee asserts that the "Fifth Circuit's opinion gives free license to franchisors to disregard their franchise agreements, provided that the breach extends to an entire region of franchisees." Pet. at 2. First, the Fifth Circuit expressly stated that it did not reach the question of breach; thus, its opinion cannot possibly have the effect Yankee claims. Second, there was no evidence that the alleged

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[9] The NAF receives twenty percent of all franchisee advertising fees. That money is used for the production of commercials, Sunday newspaper inserts, and other advertising production costs. Unused monies are then redistributed back to all markets. Tr. at 803-04.

breach extended to "an entire region of franchisees" (meaning the West region), since the evidence showed that average sales in that region increased.

4. Yankee repeatedly refers to its allegations that Dunkin' committed a wrong by focusing its development efforts in markets other than its own and by "exiting" from certain markets -- also other than its own. Pet. at 5, 7, 8. Dunkin's development strategy was the subject of Yankee's fraud claim, which was dismissed from the case on summary judgment and not appealed. Moreover, Yankee neglects to mention the following jury instruction given by the district court: "Dunkin' Donuts' decision regarding development in different markets is not a cause of action in the case or a basis for awarding damages. Nor is any decision to exit a given market a cause of action in the case." Tr. at 1112. Yankee made no objection to this instruction, thus waiving any claim it might have thought it had regarding development strategies or "exit markets."

5. While Yankee's assertion that there was a 91 percent reduction in West zone personnel has absolutely nothing to do with this case, we note that it is completely unsupportable. Dunkin' made company-wide reductions in personnel, but they were modest in number and announced to all franchisees. Tr. at 712-13, Pl. Exs. 15, 16.

6. Yankee claims that the West zone received "barely passing scores in sanitation, quality control, appearance and service (*i.e.*, 'standards')." Pet. at 2. To the contrary, franchisee witnesses testified that standards in the west are comparable to other regions. Tr. at 890, 970-71. This testimony was bolstered by statistical evidence from shop inspections showing no appreciable differences between regions in the Dunkin' system, and the testimony of Dunkin's Western zone general manager (tr. at 845-55), based on actual inspections of shops in different regions (*id.*, Def. Ex. 201).

7. Yankee argues that the franchise agreement is one-sided and lacking in mutuality. Pet. at 6. Not only has this issue never been raised before, it is also inaccurate. In addition to the standards clause at issue in this case, Dunkin' fulfills numerous obligations under the franchise agreement, which are footnoted below.[10]

8. Yankee contends that "prevailing low standards were shown within Yankee's immediate market . . . ." Pet. at 12. In fact, Nelson testified that his standards were "excellent" and those of the other shops in his immediate market were "doing quite well. . . . I'm generally pleased with what they're doing." Tr. at 220, 268-69.

9. Yankee argues that all West zone franchisees operating in compliance with the franchise guidelines were similarly and adversely affected by Dunkin's failure to maintain standards. Pet. at 13. Yankee never showed anything remotely proving this assertion. The undisputed evidence was that West zone sales *increased* steadily from 1990-1995. Def. Ex. 182.

10. Yankee asserts that its witnesses testified that low standards in the west caused it to suffer damage. Pet. at 3. The evidence was exactly the opposite. After reviewing the record, the Fifth Circuit found that "[n]o proof was presented to explain or substantiate this theory" other than a "Dunkin' franchisee

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[10] Pursuant to the franchise agreement, Dunkin' provides numerous services to franchisees, including initial training; operating procedures to assist the franchisee in developing financial records and controls, personnel policies, production methods and approved sources of supply; assistance in opening and initial operation of a shop; maintaining a continuing advisory relationship with the franchisee, including consultation in the areas of marketing, merchandising and business operations; providing and updating operating manuals; reviewing for approval all proposed advertising and promotional materials prepared by franchisees; and administering the Franchise Owners Advertising and Sales Promotion Fund and directing the development of all advertising and promotional programs.

[who] testified that a customer who had a bad experience in another Dunkin' shop in the West zone may not stop at a Dunkin' shop while driving through Beaumont. Other than this vague testimony we find no support for Yankee's theory that reduced standards in other shops in the west caused a substantial sales reduction in Yankee's shop." Pet. at 5a-6a n.3.

IV. THE QUESTIONS PRESENTED BY YANKEE MISREPRESENT THE FIFTH CIRCUIT'S RULING.

The "Questions Presented" by Yankee are improper in that they misrepresent the basis of the Fifth Circuit's ruling. First, whether a franchisor owes a duty to a franchisee to protect the reputation and goodwill of the system, i.e., the trademark, and to continue its efforts to maintain standards is controlled by the Lanham Act and the franchise agreement. Neither the district court nor the Fifth Circuit was ever asked to determine whether these duties exist. Nor is the issue of whether a franchisee can recover damages for a breach of the duty to maintain standards properly before this Court. Regardless of whether there is such a right, the Fifth Circuit found based on the record that this particular franchisee utterly failed to establish that it had suffered any damages at all.

The second question framed by Yankee is similarly flawed in that it never showed that it was a "franchisee *damaged* by franchisor's breach of contract" (emphasis added). Further, it is inaccurate to characterize the northeast, as opposed to the west, as a region that had "not been effected [sic] by franchisor's breach" because there was no evidence that *any* region had been so affected. Indeed, the Fifth Circuit found that Yankee's expert had never established any basis at all for comparing Yankee with the average shop in the northeast.

CONCLUSION

Yankee's petition for a writ of certiorari is devoid of good faith arguments based on accurate record citations aimed at relevant issues. The petition fails to raise a single issue that requires this Court's attention, and it should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1997

YANKEE ENTERPRISES, INC.,

Petitioner,

vs.

DUNKIN' DONUTS INCORPORATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Pursuant to Rule 15.6, Petitioner Yankee Enterprises, Inc. ("Yankee") files this Brief in Reply to Respondent's Brief in Opposition, in order to address new points raised in the Brief in Opposition.

I.

This case was brought because Yankee, a Dunkin' Donuts, Inc. ("Dunkin') franchisee, began experiencing an inexplicable decline in sales growth. It is undisputed that the Yankee store was extremely well-run and well-managed. It became apparent that Yankee's problems were being caused by outside influences: namely, that Dunkin', in an attempt to exit the West Zone, was decreasing supervision over and support to West Zone stores, causing a decline in standards through out the region that adversely effected Yankee. Respondent's argues on Page 2 of its Brief in Opposition that Yankee's witnesses could not testify as to any adverse effect caused by Dunkin's breach of its franchise agreement, and specifically its agreement to "maintain high and uniform standards of quality, cleanliness, appearance and service at all Dunkin' Donuts shops." This characterization of the testimony presented at trial is a misstatement of the testimony offered by Yankee's witnesses at trial. Yankee's witness, as well as exhibits and the franchise agreement itself, established that franchisees share the reputation of the franchise as a whole; therefore, each franchisee is impacted by the actions of all other franchisees within the same region to the extent that those actions adversely impact the reputation and goodwill of the franchise. It is, after all, for use and enjoyment of the good name and good will of the franchise that franchisees pay franchise fees. There was abundant testimony to support this fact by Yankee expert Harold Brown, and by other Dunkin' franchisees.

All franchisee witnesses who conducted business in the West Zone testified that the West Zone had the lowest standards of

all regions; only two franchisees from other regions testified otherwise. Profuse testimony quite critical of standards was given as to virtually all geographical areas surrounding Yankee. Lower standards caused lower sales though lower advertising funds and reduced goodwill; all of these factors adversely impacted Yankee. For Dunkin' to argue that there is no relationship between standards and sales is disingenuous; Dunkin's own Franchise Agreement emphasizes the relationship between sales and profits. (Exhibit 2, Para. 3C). The quotes cited by Dunkin' in its Brief are taken out of context and do not accurately reflect the testimony presented at trial. Yankee would urge this Court to request the record in this case in order to fully appreciate the testimony elicited at trial.

II.

Dunkin', on page 9 of its Brief in Opposition, argues that Yankees' Petition for Writ of Certiorari presents issues to this Court not previously addressed below and on Page 13, Dunkin' incorrectly asserts that the "Questions Presented" by Yankee in its Petition for Writ of Certiorari misrepresent the rulings of the Fifth Circuit. It should not be surprising that new issues are addressed in Yankee's Petition, as previously Yankee was responding to a challenge to the trial court's judgment below, and before this court Yankee is addressing errors in the Fifth Circuit's ruling.

In examining the Fifth Circuit's ruling, it is clear that the Fifth Circuit did not examine the record for evidence of breach of contract. Dunkin' argues that the Fifth Circuit could find "no evidence of damages" sustained by Yankee, but it is impossible to determine "no damages" were sustained by Yankee while failing to examine the issue of breach. The Fifth Circuit failed to take the necessary and logical step of carefully examining the record for breach to determine (1) whether a breach occurred and (2) what detrimental effect the breach had

on Petitioner. The Fifth Circuit erred in failing to examine the record as to the nature, extent and potential for damage to West Zone franchisees-especially: (1) when abundant testimony and Dunkin's self written documentation supported Yankee's theory that a reduction in standards has a direct and detrimental effect on sales; and (2) when Dunkin' admitted that it was choosing to develop markets elsewhere, rather than in the West two/thirds of the United States; and (3) when a conspiracy to exit the West Zone markets was exposed, (using Dunkin's own testimony and documents); and (4) when evidence proved that huge sums of West Zone advertising monies were diverted from the West; and (5) when there was a 91% reduction in West Zone personnel followed by the shutting down of the entire West Zone office; and (6) when franchisees complained bitterly in Dunkin's own records of loss of services and collapse of sanitation and safety standards in the West Zone; and (7) when the Dunkin' defense witness designated as "most knowledgeable", Mr. Fleck, testified that the West Zone suffers from all of these and other ills as proven so in exhibits he authored. The Fifth Circuit should have considered both the nature and the extent of the breach in order to examine what damages were caused by the breach.

III.

In response to the argument raised by Dunkin' on page 10 of its Brief in Opposition that Yankee has misrepresented that Dunkin' diverted advertising funds from the West Zone, Yankee would refer this Court to the evidence presented below. The testimony of Yankee owner Greg Nelson clearly established that Dunkin' had been diverting advertising money for years. Mr. Nelson's testimony has not, and cannot be, contested or controverted by Dunkin'. In its Brief in Opposition, Dunkin' refers to audited "National Advertising Fund" reports that indicate that the West Zone received more in benefits than it paid into the National Advertising Fund; Dunkin' fails to mention that this occurred in only one year, 1994. As the testimony of

Mr. Nelson established, there were many, many years (at least back to 1985) in which Dunkin' siphoned off advertising dollars from the West Zone for the benefit of the Northeast region, (Tr. 217), which in conjunction with the differences in store operating standards explains the "gap" in sales addressed by the Fifth Circuit. Lacking advertising funds and acceptable operating standards, sales increases in the West Zone were negligible, while increases in the Northeastern Zone were spectacularly high because the Northeastern Zone benefitted from both high standards and augmented advertising monies. This evidence alone supports the jury's finding that Dunkin' engaged in "unconscionable conduct" and clearly establishes that Yankee was damaged by Dunkin'.

The Fifth Circuit further erred in failing to recognize the relationship of standards to sales. The Franchise Agreement forming the basis of this breach of contract lawsuit recognizes that the maintenance of high and uniform standards are critical to the successful operation of the franchise. Moreover, Dunkin's own documents establish a straight line relationship between reduced standards and lower sales. The evidence at trial of damage to Yankee was supported by witnesses, documents, and common sense. The Fifth Circuit's opinion requires correction. According, Yankee respectfully requests that its Petition for Writ of Certiorari be granted.

Respectfully Submitted,

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